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MICHAEL RODAK, JR.,

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. _____

[redacted],

[redacted]

DeWITT T. HOBBS, JR.,

Petitioner,

[redacted] v.

CUSTOM FINANCE COMPANY, etc.,
GUERDON INDUSTRIES, INC., etc., and
MAGNOLIA HOMES MANUFACTURING CORPORATION, etc.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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and
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DeWitt T. Hobbs, Jr. hereby submits his petition and respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 27, 1972.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit, not yet reported, appears in the Appendix hereto. Also included in such Appendix are two memorandum opinions delivered by the United States District Court for the Eastern District of Virginia in connection with the judgments rendered which Petitioner seeks to review; and which are unreported.

JURISDICTION

1. The judgment of the United States Court of Appeals for the Fourth Circuit was entered January 27, 1972.

2. A timely petition for rehearing was denied by the United States Court of Appeals for the Fourth Circuit on March 3, 1972.

3. Petitioner believes that 28 U.S.C. § 1254 (1) confers on this court jurisdiction to review the judgment in question by writ of certiorari.

QUESTIONS PRESENTED

1. When allegations are made raising "unclean hands" issues, should a court inquire further into the matter before granting judgment to the party who allegedly has "unclean hands" relating directly to the suit controversy?

2. Are the allegations and settlement matters in a separate suit between joint venture partners sufficient evidence of "unclean hands" to deny recovery in an independent suit by one of the joint venture partners against a third party arising out of the same subject matter?

3. Do adverse actions of a noteholder even though made in good faith operate to change the status of the maker to one of a surety where the subject note is dependent upon and arises out of a contract between the parties?

STATUTORY PROVISIONS INVOLVED

In this case the following statutes of the Code of Virginia (1950), as amended are involved:

§ 8.3-119. *Other writings affecting instrument.*

(1) As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument.

(2) A separate agreement does not affect the negotiability of an instrument. (1964, c. 219.)

§ 8.3-606. *Impairment of recourse or of collateral.*

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any re-

quired presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

(2) By express reservation of rights against a party with a right of recourse the holder preserves

(a) all his rights against such party as of the time when the instrument was originally due; and

(b) the right of the party to pay the instrument as of that time; and

(c) all rights of such party to recourse against others. (Code 1950, § 6-473; 1964, c. 219.)

§ 50-11. *Admissions and representations.*

An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership. (1918, p. 544; Michie Code 1942, § 4359(11).)

STATEMENT OF THE CASE

This suit originated by means of an interpleader complaint filed under the provisions of Title 28, Section 1335, of the United States Code, as amended. Old Kent Bank and Trust Company held approximately $26,018.77 in accounts which had been assigned to it by DeWitt T. Hobbs, Jr. Conflicting claims to these accounts had been made by DeWitt T. Hobbs, Jr., Custom Finance Company, Magnolia Homes Manufacturing Corporation, Guerdon Industries, Inc., and others. Old Kent Bank and

Trust Company filed its interpleader complaint in the United States District Court for the Western District of Michigan, Southern Division. The case was transferred to the United States District Court for the Eastern District of Virginia, Norfolk Division. At the present time Old Kent Bank and Trust Company has no interest in the proceedings. The present controversy arises out of cross-claims filed in the interpleader suit.

Eastern Trailer Sales, Inc. is a bankrupt Virginia corporation. In 1966 Eastern Trailer Sales, Inc. was engaged in the retail sale of trailers and mobile homes. Sales were made from approximately seventeen different lots located throughout the State of Virginia. These lots were operated by the following wholly owned subsidiaries of Eastern Trailer Sales, Inc.: Eastern Trailer Sales of Richmond, Inc.; Magnolia Trailer Sales and Finance, Inc.; National Trailer Sales and Finance, Inc.; Ten-L Mobile Homes of Norfolk, Inc.; Tab's Trailer Sales, Inc.; Miracle Mobile Homes of Norfolk, Inc.; Capitol Mobile Homes, Inc.; Frontier Mobile Homes, Inc.; Oceana Mobile Homes, Inc.; and Western Trailer Sales, Inc. Eastern Trailer Sales, Inc. and its subsidiaries are hereinafter called Retail Dealer.

As of 1966 Retail Dealer had been doing business with Magnolia Homes Manufacturing Corporation, Custom Finance Company, Armour Mobile Homes Sales Corporation of Virginia, and Magnolia Mobile Homes Sales Corporation of Virginia. Magnolia is a Mississippi corporation engaged in the manufacture of mobile homes with various subsidiaries located throughout the United States; which formerly included Armour Mobile Homes Sales Corporation of Virginia and Magnolia Mobile Homes Sales Corporation. These two subsidiaries were dissolved by merger with Magnolia Mobile Homes Manufacturing Corporation of Virginia which was a

wholly owned subsidiary of Magnolia to whose interest Magnolia succeeded. Magnolia's principal office is located in Vicksburg, Mississippi. Custom, with its principal office in Vicksburg, Mississippi, was a Mississippi corporation engaged in the financing business. All of the stock of Custom was owned by Magnolia, and upon the liquidation of Custom, all of its assets and liabilities became the assets and liabilities of Magnolia. Guerdon is a Delaware corporation, with its principal office in Louisville, Kentucky. Guerdon is doing business in various states of the United States and is engaged in the manufacture of mobile homes, pre-built homes and other related activities. Magnolia merged with Guerdon, and all of the stock of Magnolia is now owned by Guerdon. Custom, Magnolia, and Guerdon are hereinafter referred to as Respondent Manufacturer.

Midland-Guardian Company of Georgia was a wholly owned subsidiary of Midland-Guardian Company. Midland and its subsidiaries are engaged in dealer and consumer financing in the Midwestern and the Southeastern United States. Midland is unrelated to any of the parties in this suit, except that Midland at one time was a joint venture partner with Respondent Manufacturer. As of 1966 and before, Retail Dealer was doing business with Midland. At that time Midland was financing the inventory purchases of Retail Dealer from Respondent Manufacturer. Retail Dealer would receive from Respondent Manufacturer new trailers and mobile homes. At such time as these units were physically received by retail dealer, Midland, hereinafter called Finance Company, would receive documents issued by Respondent Manufacturer. The trade purpose of these documents was to evidence title to the new trailers and mobile homes. These documents are sometimes

called Certificates of Origin and/or Certificates of Title. These documents would enable the Finance Company to perfect senior liens upon the new trailers and mobile homes. In this way the Finance Company would be secured for funds loaned to Retail Dealer; and, of course, such funds would enable Retail Dealer to purchase new trailers and mobile homes from Respondent Manufacturer.

When Retail Dealer would sell and remove a trailer or mobile home from one of its lots, it was required to notify the Finance Company and pay a proportionate share of its debt to the Finance Company. This payment would represent the amount loaned to Retail Dealer for the original purchase of the subject trailer or mobile home from the Respondent Manufacturer. At such time as it received payment, Finance Company would deliver the document to the Retail Dealer. In order for the Retail Dealer to transfer a clear title to a retail purchaser, it was necessary that it obtain such document from the Finance Company.

From time to time it was the trade custom of Financy Company to make a physical inspection of Retail Dealer's lots. The purpose was to determine that all trailers and mobile homes which secured the loan and were represented by such documents were still physically in the possession of Retail Dealer. If any trailer or mobile home was not found in the possession of Retail Dealer, them it was assumed that Retail Dealer had sold the trailer without paying the Finance Company's debt. In such a situation, a party is said to be "Out of trust" as to such missing property for which the lien remains unsatisfied and the debt unpaid.

In 1966, Retail Dealer, Finance Company, and Respondent Manufacturer, along with DeWitt T. Hobbs, Jr., hereinafter called Petitioner, entered into an ex-

tensive written agreement, dated May 12, 1966. (See defendant's Exhibit U and Exhibit D, record page 343). At that time and for almost nine years before, Retail Dealer was and had been Trailer Manufacturer's largest dealer. Retail Dealer had experienced financial difficulty;. and this was the setting for the May 12, 1966, agreement.

Pursuant to the terms of the May 12, 1966, agreement, three promissory notes were made by Retail Dealer. One note was dated May 12, 1966, in the sum of $200,000.00, payable to the order of Respondent Manufacturer; one was dated May 12, 1966, in the sum of $499,841.43, payable to the order of Respondent Manufacturer; and one was dated May 26, 1966, in the sum of $100,000.00, payable to the order of Retail Manufacturer. Petitioner under the terms of the May 12, 1966, agreement, also signed the three notes. Two checks were paid to Retail Dealer by Respondent Manufacturer; one check, dated May 11, 1966, was in the sum of $200,000.00, and another check, dated May 26, 1966, was in the sum of $100,000.00. The two notes in the same amounts evidenced the debts for these checks. The third note for $499,841.43 represented a previous debt of Retail Dealer to Respondent Manufacturer. These payments and notes were according to the express terms of the May 12, 1966 agreement. To secure these notes, certain reserve accounts of Retail Dealer were assigned to Respondent Manufacturer by instrument dated May 16, 1966. Neither the notes, assignment, nor the agreement of May 12, 1966, expressly states the capacity of Petitioner.

In 1966 Retail Dealer was perhaps one of the largest retail sellers of trailers and mobile homes in the United States. At that time it had approximately 200 employees, including Petitioner. Petitioner was

also a corporate officer, director and the sole stockholder of Retail Dealer. After the May 12, 1966, agreement was reached, Retail Dealer continued to operate its business as before.

During the first part of July, 1966, Finance Company and Respondent Manufacturer complained that Retail Dealer had breached the agreement of May 12, 1966, and failed to make payments on the notes. Also, it was claimed that Retail Dealer was "out of trust"; i.e., trailers and mobile homes were missing from Retail Dealer's lots for which Finance Company had not been paid, and for which the documents of title remained in the possession of Finance Company.

Instead of pursuing the usual and customary legal remedies, Respondent Manufacturer and Finance Company elected to enter into a joint venture agreement evidenced by a letter, dated July 13, 1966. (See Respondent Manufacturer's Exhibit W; and Exhibit #E, Record page 361), Pursuant to this joint venture agreement, Finance Company and Respondent Manufacturer exercised stock and proxy assignments of Retail Dealer given to them under the agreement of May 12, 1966. Over the objection of Petitioner, Finance Company and Respondent Manufacturer continued the May 12, 1966, agreement in full force and effect, except that Petitioner was removed as a corporate officer, director and employee. Further, Petitioner from that point on had no voice or control in the affairs of Retail Dealer. Petitioner was made to disassociate himself from the affairs of Retail Dealer.

By means of their position of full control, Respondent Manufacturer and Finance Company caused Retail Dealer to continue on in business. This included causing Retail Dealer to borrow from them an additional

$300,000.00 secured by items included in the May 12, 1966, agreement and all other funds and assets of the Retail Dealer. Thus, under the joint venture agreement of July 13, 1966, and without Petitioner's consent additional funds were borrowed by Retail Dealer. Retail Dealer, but not Petitioner, executed additional promissory notes and security agreements. Petitioner never consented to the changes and additions made to the May 12, 1966, agreement by the joint venture agreement of July 13, 1966.

Within a few months thereafter, in 1966, while under the control and supervision of Finance Company and Respondent Manufacturer, the financial condition of Retail Dealer deteriorated. Certain Federal taxes were not paid and Internal Revenue agents closed the business of Retail Dealer in October of 1966.

While Petitioner controlled and supervised Retail Dealer, its business records and corporate minutes were available and were sufficient to permit audited reports of Retail Dealer's business. After Respondent Manufacturer and Finance Company took control and supervision of Retail Dealer, the bulk of such records disappeared. A bankruptcy petition was filed against Retail Dealer in 1967, but before that, on November 21, 1966, Respondent Manufacturer filed suit against Finance Company. [1] (See Volume II of the record, pages 320 through 798.) This suit was between the two joint venture partners and arose out of their relationships with Retail Dealer and the agreements of May 12, 1966, and July 13, 1966. In the complaint of Trailer Manufacturer against Finance Company the following allegations, among others, were set forth:

1. See record, page 308, for order incorporating herein the record of ended Civil Action No. 5873 for appeal purpurposes, etc.

1. Finance Company at all times pertinent to the May 12, 1966, agreement, had its representatives located on the premises of Retail Dealer and such representatives approved checks drawn by Retail Dealer which may not have been properly applied in accordance with the terms of the May 12, 1966, agreement and the July 13, 1966, agreement.

2. Finance Company wrongfully seized possession and set aside for its own use all the corporate records, books, accounts, furniture, fixtures and equipment of Retail Dealer.

Finance Company answered the complaint by denying the essential allegations, and then went on to allege:

1. Respondent Manufacturer had not performed all of the terms required of it by the May 12, 1966, agreement.

2. Respondent Manufacturer was issuing false or fictitious invoices, and releasing certificates of origin for trailers and mobile homes to the Retail Dealer prior to the delivery of such trailers and mobile homes to Retail Dealer.

Finance Company filed a counter-claim alleging:

1. Respondent Manufacturer falsely stated that the debt of Trailer Dealer to it on May 12, 1966, was $499,841.40. [2]

2. Respondent Manufacturer received payments from Retail Dealer after May 12, 1966, in breach of the agreement of that date.

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2. This is the debt represented by one of the notes upon which judgment was granted herein against Petitioner in favor of Respondent Manufacturer. See final judgment, Record page 304.

3. Respondent Manufacturer refused to reimburse Finance Company for its loss suffered by reason of 22 mobile homes being out of trust by Retail Dealer after July 13, 1966. [3]

4. Respondent Manufacturer permitted the Retail Dealer to be out of trust and allowed Retail Dealer to make payments for mobile homes purchased in many instances as long as two or three months after invoice date.

5. Respondent Manufacturer's acts were contributing causes to the economic failure of Retail Dealer.

Respondent Manufacturer then amended its Complaint and stated that Finance Company knew that the Agreements of May 12, 1966, and July 13, 1966 would place both in a position of control with regard to the operation and supervision of the affairs of Retail Dealer. Respondent Manufacturer admitted that as a result, Financy Company and it actually controlled and supervised operations of Retail Dealer. Respondent Manufacturer alleged that it relied upon Finance Company to apply the sums advanced in accordance with the two agreements.

Respondent Manufacturer and Finance Company actively fought one another almost four years. Finally, in the latter part of 1970 they compromised their suit. By agreement, a final order was entered terminating the case. Such termination was provided for in the release agreement; and they also agreed to terminate the bankruptcy proceedings of Retail Dealer. (See Respondent Manufacturer's - Guerdon Exhibit X-1). From an inspection of the suit papers in the case between

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3. As noted, *infra*, this was after Petitioner had been removed as an officer, director and employee of Retail Dealer.

Respondent Manufacturer and Finance Company, it can be seen that there never was an accounting for Retail Dealer's operations while under their control.

Until the counter-claims were filed in the present case, there was never a suit brought against Petitioner by Respondent Manufacturer. And the claims finally brought against Petitioner were brought in the form of simple promissory note actions on the three notes mentioned previously. One claim was based on the note for $499,841.43 which evidenced an amount allegedly due – this is the same debt that the joint venture partner claimed to be falsely stated by the Respondent Manufacturer. In the present controversy, Respondent Manufacturer has implied that Petitioner individually was responsible for Retail Dealer being "out of trust". However, Respondent Manufacturer offers no explanation for the 22 mobile homes "out of trust" by Retail Dealer after Petitioner lost control, and after Retail Dealer was under the control and supervision of Respondent Manufacturer and Finance Com-Company.

Finance Company in its allegations does suggest an explanation. When Respondent Manufacturer issued false documents of title, this resulted in Finance Company floor planning fictitious property – property which was never actually in the possession of Retail Dealer and presumably property which did not exist. Obviously, someone connected with Retail Dealer had to cooperate with Respondent Manufacturer in order to obtain the financing from Finance Company. The fact that the "out of trust" condition continued after Petitioner left, points out that it was permitted by a person other than Petitioner.

Petitioner was not aware of Respondent Manufac-

turer's illegal acts until after the trial in this case. At the trial Petitioner was misled by the false testimony of Mildred C. Johnson, a representative and officer of Respondent Manufacturer. When asked about the litigation between Respondent Manufacturer and Finance Company, she denied that there was any problem, denied that the inability to obtain an accounting was part of the reason for the suit, and denied any problem with the May 12, 1966, agreement. This same witness swore to the truth of the original complaint filed by the Respondent Manufacturer against the Finance Company.

In its suit against Finance Company, Respondent Manufacturer said that the Finance Company had the records of Retail Dealer and that payments were made and received in violation of the May 12, 1966, agreement. Both joint venture partners claimed that records had been secreted by one another contrary to the spirit and terms of the May 12, 1966, agreement. In its claim against Petitioner, Respondent Manufacturer relied on its own records to prove the sums then due against Petitioner on the promissory notes. Over Petitioner's objection, Respondent Manufacturer never offered the audited records of Retail Dealer, and never explained its inability to provide such. Judgments for the indicated balances were entered against Petitioner as a maker of the notes.

REASONS FOR GRANTING WRIT

1. When it is alleged that a party with unclean hands has taken advantage of its own wrongs and has committed criminal acts, a Court should inquire into such alleged wrongdoings so as to protect its own integrity and the administration of justice; and the sanctioning of such a refusal by

a lower Court is such a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

One usually thinks of the "clean hands maxim" as being applicable in courts of equity. In the present case the Courts below have consistently construed the Respondent Manufacturer's suit to be simple law actions for the breach of promissory notes. Perhaps the Courts below felt that the "clean hands maxim" did not apply in law actions. Of course, this is not correct. As stated by Justice Brandeis:

> The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Olmstead v. United States, 297 U.S. 438, 483; 72 L.Ed. 944; 48 S.Ct. 564; and 66 ALR 376 (1927).

This statement is supported in Broom's Legal Maxims, Tenth Edition, at page 191, stating "The maxim that no man shall take advantage of his own wrongs is fully recognized in courts of law and equity, and admits of illustration from every branch of legal procedure. See also, *Re Estate of Ives,* 72 ALR 2d 278, 248 N.C. 176, 102 S.E. 2d 807 (1958).

Or, perhaps the lower Courts felt that Petitioner's complaint was not timely raised. The wrongful acts were not brought to the Court's attention until after the trial and after one of the final judgments had been entered. The "Motion of DeWitt T. Hobbs, Jr. for Relief from Final Judgment Pursuant to Rule 60 of the Federal Rules of Civil Procedure" first brought to the attention of the Court the wrongful acts of the Respondent Manufacturer. This motion raised the following issues:

a. The Respondent Manufacturer had fraudulently misrepresented to the Court its claims against Petitioner.

b. The Record in the ended suit between Respondent Manufacturer and its joint venture partner contradicted testimony in the present case given by Mildred C. Johnson, in behalf of the Respondent Manufacturer.

c. The Record in the ended civil case between the joint venture partners alleged numerous fraudulent acts of the Respondent Manufacturer which affected Petitioner and which would excuse Petitioner from any liability. See Record, page 268 through 272.

Further, Petitioner's counsel in arguing the motion emphasized that the pleadings in the ended suit between Respondent Manufacturer and its joint venture partner, Finance Company, alleged criminal acts on the part of Respondent Manufacturer. See Record, Reporter's Transcript, Volume VIII, page 13, lines 1 -- 10.

In his Petition for rehearing submitted to the Fourth Circuit Court of Appeals, Petitioner raised the "clean hands" issue. In spite of this, neither the District Court nor the Court of Appeals has directly commented on the "clean hands" issue. However, the District Court in speaking of the ended suit between the joint venture partner and Respondent Manufacturer did say:

> The Court: That was between, as I recall it, the Guerdon Industries, or then whatever the name of the company was from down in Mississippi and the other company as to the agreement between them. But that hasn't anything to do with the $498,000.

Mr. Cloud: It certainly did.

> The Court: I think I know more about the case than you do, Mr. Cloud, under the circumstances. But I will read the motion and the affidavit and will let you hear from me in the next couple of days. If there is anything done in it, it is going to be a very brief delay for you to file whatever discovery evidence you can file. And this is the last go-around, if I do this. Do you understand that? See Record, Reporter's Transcript, Volume VIII, pg. 13, lines 11 through 23.

In its Memorandum Opinion as to this Motion, the District Court said: "A review of that motion adds nothing relevant to the matters before this court and is denied." See Record, page 281. And later, the District Court went on to state: "It represents some of the free-wheeling general language that roars in a teapot." See Record, page 281. Yet, a mere perusal of the record in the ended case would have indicated that the suit concerned the very agreement upon which the three promissory notes were based; and upon which Respondent Manufacturer was suing Petitioner.

In spite of the District Court's statement to the contrary, the record of the case between the Respondent Manufacturer and Finance Company does indicate that the $498,000.00 was in issue. In its counterclaim against Respondent Manufacturer, the joint venture partner claimed:

> Plaintiffs [Respondent Manufacturer] represented that the entire indebtedness of Eastern Trailer Sales, Inc., and its subsidiaries owed to plaintiffs on May 12, 1966, was $499,841.43. Said representation was false. See Record, Paragraph III, 2, page 461.

Petitioner urges that the lower Courts should have responded to the "clean hands" issue when raised. Consider the following:

> Whenever in the course of a proceeding the Court is informed in any way that the plaintiff is without clean hands . . . the Court should inquire into the facts of its own accord, and if it finds the charge to be true, relief should not be granted. Frank Adam Electric Company v. Westinghouse Electric and Manufacturing Company, 146 F. 2d 165, 167 (8th Circuit, 1945). Emphasis added.

This principle was recognized in *Hardinge Co. v. Jones and Laughlin Steel Corp.*, 164 F. Supp. 75, 77 (D.C. Pa., 1958) wherein the Court said:

> In applying the "clean hands" maxim, the Court is concerned primarily with protecting its own integrity from improper action by a party . . . the latter [clean hands maxim] need not even be pleaded.

Justice Frankfurter, in *Johnson* v. *Yellow Cab Transit Company*, 321 U.S. 383, 403, 64 S.Ct. 622, 88 L.Ed. 814 (1943) quoting Justice Brandeis, states:

> But the objection that the plaintiff comes with unclean hands will be taken by the Court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The Court protects itself. Olmstead v. United States, *supra* at page 485.

The lower Court was encouraged and urged to inquire into the alleged wrongful, fraudulent and criminal acts of the Respondent Manufacturer. Instead, the lower Court let stand its previous judgment on two of the notes and granted another judgment to the Respondent Manufacturer on the third note. This third note was in

the principal sum of $499,841.43 -- this was the same note representing the same debt said to be falsely stated by a party in a position to know: Respondent Manufacturer's joint venture partner, Finance Company.

To an impartial observer this would seem to suggest that power, prestige and money can limit the administration of justice. Here two corporate giants took control of Retail Dealer. While under their control, records which would explain their operation disappeared. In discussing any statements and records which might have remained after the Respondent Manufacturer operated and controlled the business, one of its corporate officers stated: "No, sir. The last time I was there you couldn't find any books and records, and everything was in a mess. All the deferred certificates suddenly disappeared . . ." See Record, Reporter's Transcript, Vol. V, p. 242, line 24 to p. 243, line 3.

One blamed the other for the failure of the company. One claimed the other committed fraudulent and criminal acts. During this fight, neither made claims against Petitioner. Instead, their money and power permitted them to litigate in Court for years, and then, by their own agreement, to terminate both the suit, as well as the related bankruptcy case. The wrongful acts plus the records which would show what took place were thus buried. It became impossible for Petitioner to fully present his defense. Instead of bringing in the records of Bankrupt Retail Dealer, Respondent Manufacturer brought in its records to misrepresent what happened. Petitioner was given the impossible burden of producing records to prove otherwise -- records which Respondent Manufacturer and its joint venture partner had previously refused to provide; and which they controlled. Surely fairness should deny the claim of

Respondent Manufacturer. Petitioner adopts the following principle as being clearly applicable in this case:

> Under the 'unclean hands' doctrine, misconduct which will bar an action in equity does not necessarily need to be fraudulent; it is enough that the party seeking relief has been guilty of inequitable conduct in the very matter about which affirmative relief is sought. Godwin v. Gerling, 40 ALR 2d 1250, 362, Mo. 19, 239 S.W. 2d 352 (1951).

Respondent Manufacturer should have been denied a recovery.

> 2. Whether one by reason of the circumstances of the parties and/or by operation of law becomes a surety is an important federal question which has not been, but should be settled by this court.

This issue is very much related to the "clean hands" issue, *supra*. A surety relationship is where the parties are not on an equal footing. Such a relationship may be present from the start by reason of the express terms of the agreement, or it may arise later by reason of a change in circumstances. 50 Am. Jur., Suretyship § 11 states:

> The relation of suretyship, although it generally is created by express contract of the parties and with the consent of the creditor, may nevertheless arise by operation of law, for the law will sometimes place a person already bound upon some other contract in the situation of surety by extending to him the privileges of this relationship.

In either instance the acts of the creditor affecting the surety must be fair and equitable. If not, he will be denied relief against the surety.

Even though there are no contractual terms of suretyship, where fairness demands, it will be supplied. See 18 M.J., Suretyship, § 3 stating "Also, for the purpose of working out equity and justice, parties may be treated in a court of equity as standing in a relation of suretyship . . ."

If not before, Petitioner surely by operation of law became a surety at some point after he was ousted by Respondent Manufacturer and its joint venture partner. After ousting Petitioner they proceeded to run and control the business until it failed. They made changes to the original May 12, 1966 agreement and caused the Retail Dealer to execute additional notes and security instruments and thereby borrow additional money. There is no dispute about this -- Respondent Manufacturer has stated:

> (e) The Plaintiffs [Respondent Manufacturer] in accordance with the terms and spirit of the Agreements of May 12, 1966 and July 13, 1966, allowed the defendants [Finance Company] to control and supervise the operations of Eastern Trailer Sales, Inc.; allowed the defendants to maintain agents and employees of the defendants at the premises of Eastern Trailer Sales, Inc. to the exclusion of those of the plaintiffs; advanced the sum of $429,791.96 to Eastern and the defendants and allowed the defendants to control the application of all sums advanced by the plaintiffs and the defendants, and relied upon the defendants applying sums advanced in accordance with the Agreements of May 12, 1966 and July 13, 1966. See Record, page 519.

All was done without Petitioner's consent, and over his objection. More than once in the trial we find conflicting statements by Respondent Manufacturer denying control by the joint venture partners:

Q. Well, I use that not in the strict sense, but I submit that you did direct the operation of Eastern.

A. No, Sir. We did not direct the operations of Eastern. We elected the same management when Mr. Hobbs was there.

Q. Now you couldn't have, Mrs. Johnson, because he had gone.

A. With the exception of Mr. Hobbs.

See Record, Reporter's Transcript Volume VI, page 285, lines 13 -- 20.

The July 13, 1966 agreement amended the May 12, 1966 agreement; there is no dispute about this:

Q. My point is that the May 12 agreement, and this is a question, wasn't it put on the shelf and the July 13th agreement became a brand-new thing that the parties abided by?

A. No, Sir. If it was put on the shelf we couldn't have foreclosed on the rolling stock or done anything with the incentives, or we couldn't have done anything with the reserves. No. That is not spelled out in the July 13th agreement. We didn't put it on the shelf. It is an amendment to it.

See Record, Reporter's Transcript Volume VI, page 287, lines 11 -- 20.

Nor is there any dispute that Petitioner was not a party to the July 13, 1966 agreement. After Petitioner was required to resign,

A. We [Respondent Manufacturer] immediately went to Eastern Trailer Sales to set up personnel of Eastern and give areas of responsibility to employees of Eastern Trailer Sales, Inc. that were on the premises. Mr. Zersey and Mr. Phipps,

Mr. Wheatly was there, and we designated areas of responsibility, and they were familiar with the business and had been long employees of the business. We then reached an agreement with Midland Guardian that we would advance up to the sum of $300,000.

Q. Pause right there. I now show you a document designated as Exhibit W in the pre-trial order and a letter agreement dated July 13, 1966, and ask you if you can identify that?

A. Yes. I drafted that account.

See Record, Reporter's Transcript, Volume V, page 91, line 24 -- page 92, line 12.

It has long been established in Virginia that a change in a contract without the consent of a surety operates to discharge the surety from liability. In *Dey, Receiver* v. *Martin*, 78 Va. 1 (1883), the Court said:

> An endorser of a note is a surety for the maker; and the doctrine is well established that any change in the contract, however immaterial, and even though it be for his advantage, discharges the surety, if made without his consent.

See also Citizens & Marine Bank of N.N. v. McMurran, 138 Va. 657, 662, 123 S.E. 507 (1924). Yet, the lower court seemed to take the position that the execution of a negotiable instrument negated all defenses, including those of a surety.

It was also suggested that § 8.3-606, Code of Virginia (1950), as amended (Uniform Commercial Code) changed the holding in the *Dey* case, *supra*. See the final paragraph to the Virginia Code Commission's Comment to § 8.3-606, Code of Virginia. This may be true if the controversy is limited to negotiable instru-

ments. No where is it suggested that this code section changes the general law of contracts as far as suretyship is concerned. In this case the three notes were governed by the agreement of May 12, 1966, Here, § 8.3-119 (1), Code of Virginia (1950), as amended states:

> As between obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction . . .

Surely the court below should have considered the notes as being interrelated and dependent upon the May 12, 1966 agreement. Also, the court should have interpreted the May 12, 1966 agreement in the light of the surrounding facts and circumstances so as to determine whether the terms of the notes by operation of law were modified to the extent that Petitioner became a surety rather than a maker.

Even if this was not the case, the acts of Respondent Manufacturer would discharge Petitioner under § 8.3-606 of the Virginia Code, *supra* which in part provides:

> (1)(b) The holder discharges any party to the instrument to the extent that without such party's consent the holder . . . unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

At the very least the acts of Respondent Manufacturer as holder impaired the collateral. Petitioner has no chance of making a recovery against the now bankrupt Retail Dealer.

Respondent Manufacturer's joint venture partner blames the failure of Retail Dealer on Respondent Manufacturer. See Record, page 465, paragraph VIII, 6. Hornbook law reminds us that statements of the partner about the other within the scope of the partnership constitute evidence against the partnership. The State of Virginia follows this rule: "An admission or repreresentation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership." § 50-11, Code of Virginia (1950), as amended.

Petitioner has set forth some of the wrongful acts of which Respondent Manufacturer has been accused by its joint venture partner, Finance Company. This very partner has said that after the business failed the Respondent Manufacturer failed to make an accounting of the monies due the bankrupt retail dealer on account of incentives and reserves. See Record, page 462, paragraph IV, 3. The alleged wrongs of Respondent Manufacturer are too numerous to relate; but only the slightest perusal of the Record will establish that these two joint venture partners claimed wrongful acts on one anothers part in relation to the bankrupt retail dealer and the May 12, 1966 agreement. This was clearly evidence to support Petitioner's contentions -- and it impeaches the evidence of the Respondent Manufacturer in chief, as well as the testimony of its officer, *supra*. Whether or not Petitioner was a surety, these acts would operate to discharge him from liability on the notes.

CONCLUSION

Petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion

of the United States Court of Appeals for the Fourth Circuit.

CHARLES R. CLOUD
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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF VIRGINIA

Norfolk Division

OLD KENT BANK AND TRUST CO

v.

DeWITT T. HOBBS, JR., *et als*

CIVIL ACTION
464-70-N

COURT MINUTES AND OPINION

This matter came on for a motion for summary judgment presented by Mr. MacMillan in connection with a $499,843. Open note signed by Mr. Hobbs and his corporation, a copy of which is in the file and is dated April 12, 1966.

It was represented to me that a hearing before Judge Kellam in October that the trial on the $499,843. issue was separated from the trial on a $300,000. obligation (composed of two notes $200,000. plus $100,000.), in order to give the defendant, Hobbs, an opportunity to take discovery towards proving any defense that he might have to a note which admittedly he executed. As I understand those defenses, they are:

(1) That the agreement of May 12, 1966 makes this a corporate responsibility and would relieve Hobbs personally. I have told Mr. Ball that I thought this was a frivolous defense in view of the fact that Mr. Hobbs has personally signed the note. In my finance ex-

perience, this is the reason individuals are required to sign corporate notes so that there will be no question that the responsibility is for the individual and not one to be absorbed by the corporation.

(2) Mr. Ball suggests that the agreement of May 12 was in some manner breached by the parties who were the lenders under that agreement and as such, Mr. Hobbs has been discharged from his liability. I told Mr. Ball that I heard all of the evidence that I thought that was available on this subject dealing with the termination of the agreements and the ouster of Hobbs in July of 1966 and that unless there was additional evidence from some source not yet produced, I was convinced that there had been no violation of the agreement and that this would not be a valid defense.

(3) Mr. Ball suggests that the creditors preferred themselves in the disposition of assets that came in their hands.

I have given Mr. Ball 30 days, until March 2, 1971, to take such deposition and to present to me such evidence as he feels would in any wise sustain any one of these three defenses and I will review it at that time.

I have been completely candid with him that unless he produces something I have not yet heard, I intend to enter summary judgment on the $499,843. note on that date. If the evidence presented in form of discovery is such as to warrant a further trial date, one will be immediately set to the end that this case will get off this docket this spring, one way or the other.

COPIES OF THESE MINUTES WERE FORWARDED TO COUNSEL PRESENT.

John A. MacKenzie
United States District Judge
Norfolk, Virginia
February 2, 1971

IN THE UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF VIRGINIA

Norfolk Division

OLD KENT BANK AND TRUST CO.

v.

DwWITT T. HOBBS, JR., *et als*

CIVIL ACTION
464-70-N

MEMORANDUM OPINION

On January 4 and 5, 1971, this court fully heard testimony on the matter of defendants' liability on two notes, one dated May 12, 1966 in the amount of $200,000.00, and the second dated May 30, 1966 in the

amount of $100,000. The decision that there was liability and that the Old Kent Bank and Trust Company reserve had been pledged as security for that liability, was announced from the bench at the conclusion of the evidence. The court might add that the evidence supportive of that decision was not simply a preponderance -- it was overwhelming -- and for the most part not relevantly questioned.

The entry of a formal judgment order as to that phase of the case was entered on February 2, 1971. No cause to set the same aside under Rule 60 of the Federal Rules of Civil Procedure has been shown. It will not be disturbed.

* * * *

There remained pending - by order - not an issue to be heard on January 4, 1971, - the matter of Hobbs' liability on a note signed by him personally (and also by his many corporations), dated May 12, 1966, in the amount of $499,841.43, being the balance due for mobile units delivered but not then paid for. The correctness of the amount of the note was agreed to by him in the text thereof.

On February 2, 1971, a motion for summary judgment on that note came on to be heard. Mr. Ball, attorney for Hobbs, objected to the entry of the judgment, suggesting that he wanted additional time to seek discovery information.

This same "evidence to be discovered," had earlier been the reason, on December 2, 1970, for the separation of the $499,841.43 note from the issues to be heard on January 4, 1971. Nothing was done to pursue such discovery between December 2, 1970, to January 4, 1971, nor to February 2, 1971, nor to March 2, 1971.

On February 2, 1971, the court was of the mind to then grant summary judgment on the $499,841.43 note, but in an abundance of caution, gave the defendant Hobbs until March 2, 1971, to take further discovery and to present it.

On March 2, 1971, no further effort at discovery has been made. Instead, defendant Hobbs has hired new attorneys and files a "Motion of DeWitt T. Hobbs, Jr. for Relief from Final Judgment Pursuant to Rule 60 of the Federal Rules of Civil Procedure."

A review of that motion adds nothing relevant to the matters before this court and is DENIED.

The thirty days given Mr. Ball, Hobbs' attorney, to take and present any deposition was allowed only with reference to the $499,841.43 note and had nothing to do with the liability already announced on January 5, 1971 on the two notes of May 12, 1966 and May 30, 1966, totaling $300,000.00.

The case now rests solely on the matter of the $499,841.43 note. That note is in evidence, signed by Hobbs, acknowledging it to be a proper account for mobile units for which payment was then due in May, 1966. Testimony from an accountant for Eastern Trailer Sales, and others, already heard by the court, fix that amount as correct. Hobbs, himself, gave a like figure to the attorney for Midland-Guardian Co.

Twice, final disposition has been delayed pending Hobbs' taking further evidence. None has been produced.

The language of the motion apparently addressed to the judgment already rendered on the May 12 and May 30, 1966 notes, but which can be construed as relating also to the $499,841.43 note adds nothing. It

represents none of the free-wheeling general language that roars in a teapot.

The motion for summary judgment will be granted upon presentation by the attorney for Guerdon Industries, Inc. of a proper order referring to this brief Memorandum Opinion.

United States District Judge
Norfolk, Virginia
March 5, 1971

IN THE UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF VIRGINIA

Norfolk, Division

OLD KENT BANK AND TRUST CO.

v.

DeWITT T. HOBBS, JR., *et als*

CIVIL ACTION
464-70-N

[First]

FINAL JUDGMENT

This day again came the parties on the Interpleader Petition of Old Kent Bank & Trust Company of Grand

Rapids, Michigan, transferred to this District from the United States District Court for the Western District of Michigan, Southern Division, by Order of Transfer dated June 12, 1970; on the Cross-Claim of Custom Finance Company against DeWitt T. Hobbs, Jr., and his Answer thereto; on the Cross-Claim of DeWitt T. Hobbs, Jr. against Guerdon Industries, Inc., Magnolia Homes Manufacturing Corp. and Custom Finance Company, and their Answer thereto; on the Cross-Claim of Magnolia Homes Manufacturing Corp. against DeWitt T. Hobbs, Jr. and his Answer thereto; on the pre-trial admissions and stipulations; on the evidence and exhibits presented at the ore tenus hearing on the merits held on January 4th and 5th, 1971, all matters of fact and law having been submitted to the Court for determination; on the memoranda of law and argument of counsel; and on the Court's Memorandum Opinion of January 5, 1971; and,

It appearing to the Court that William R. Moore, Jr., Trustee in Bankruptcy for Eastern Trailer Sales, Inc., Fred Martin, State Court Receiver for Eastern Trailer Sales, Inc., and John M. Cloud, Attorney for the Receiver, were all made parties to the Interpleader Petition filed herein, and appeared and stated that they had no interest in the matters in controversy in this case, it is determined that the Estate of Eastern Trailer Sales, Inc., bankrupt, has no interest in the funds before the Court; and,

It further appearing that by agreement dated May 12, 1966, Eastern Trailer Sales, Inc. and its subsidiaries and DeWitt T. Hobbs, Jr., individually, solemnly covenanted and agreed to assign all bank reserve accounts owned by Eastern Trailer Sales, Inc. to Custom Finance Company to secure certain promissory notes aggregating $300,000.00 and dated May 12, 1966 and

to further secure a certain promissory note to Magnolia Mobile Homes Sales Corp. and Armor Mobile Homes Sales Corp. in the sum of $499,841.43 and dated May 12, 1966, the said reserve accounts to be applied first to satisfy Custom Finance Company loans and then to be applied to the loans of said Magnolia and Armor; and,

It further appearing that by instrument dated May 16, 1966, Eastern Trailer Sales, Inc. and its subsidiaries did fully assign all of its interest in the various reserve accounts in the Southern Bank of Norfolk, Norfolk, Virginia, Bank of Chesapeake, Chesapeake, Virginia, G.A.C. Finance Corporation, of Detroit, Michigan, Old Kent Bank & Trust Company, Grand Rapids, Michigan, Union Bank & Trust Company, Bethlehem, Pennsylvania, General Electric Credit Corp., Philadelphia, Pennsylvania, American Security & Trust Company, Washington, D.C., Philadelphia National Bank, Philadelphia, Pennsylvania, and Commercial Credit Corporation, Norfolk, Virginia, to Custom Finance Company; and

It further appearing Eastern Trailer Sales, Inc. and its subsidiaries, the owner of said reserves, agreed on July 13, 1966, to further assign said reserves to secure a series of promissory notes aggregating $156,000.00 to Magnolia Homes Manufacturing Corp., of Vicksburg, Mississippi; and,

It appearing to the Court, and the Court so finds and determines, that DeWitt T. Hobbs, Jr. has no interest whatsoever in or to any of the aforesaid bank reserve accounts, either in his own name or in the name of Eastern Trailer Sales, having assigned all of his right, title and interest in or to the said bank reserve accounts in the Southern Bank of Norfolk, Norfolk,

Virginia, Bank of Chesapeake, Chesapeake, Virginia, G.A.C. Finance Corporation, of Detroit, Michigan, Old Kent Bank & Trust Company, Grand Rapids, Michigan, Union Bank & Trust Company, Bethlehem, Pennsylvania, General Electric Credit Corp., Philadelphia, Pennsylvania, American Security & Trust Company, Washington D.C., Philadelphia National Bank, Philadelphia, Pennsylvania, and Commercial Credit Corporation, Norfolk, Virginia, to Eastern Trailer Sales, Inc. at the time of its incorporation of the sole proprietorship known as DeWitt T. Hobbs, Jr., individually and trading as Eastern Trailer Sales, said sole proprietorship having ceased doing business on January 1, 1963; and

It further appearing that Guerdon Industries, Inc. and Magnolia Homes Mfg. Corp. and Custom Finance Company have applied by motion for a determination under Rule 54(b), and it appearing that the Court by its Memorandum Opinion of January 5, 1971 determined all but one of the multiple claims involved in this proceeding, namely, Guerdon's Cross-Bill against DeWitt T. Hobbs, Jr. for judgment on a certain promissory note in the sum of $499,841.43 which claim is continued on the docket notwithstanding this final judgment order, and that no just reason for delay in directing final judgment as to the several claims already decided has been shown, the Court doth ORDER pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that this judgment order is a final judgment as to each of the following determined matters:

NOW THEREFORE, the Court doth ORDER, ADJUDGE and DECREE that:

1. The sum of $27,686.96 held in the registry of this Court and being the net proceeds of the bank re-

serve accounts heretofore on deposit in the Old Kent Bank & Trust Company of Grand Rapids, Michigan, is ORDERED and DECLARED to be the sole property of Magnolia Homes Manufacturing Company of Vicksburg, Mississippi, successor of Custom Finance Company, and the Clerk of this Court is hereby ORDERED and DIRECTED to cause said fund to be paid over and delivered to Magnolia Mobile Homes Manufacturing Corporation, successor of Custom Finance Company; and,

2. Magnolia Mobile Homes Manufacturing Corporation of Vicksburg, Mississippi, successor of Custom Finance Company, is hereby AWARDED Final Judgment on the promissory note payable to Custom Finance Company dated May 12, 1966 in the original amount of $200,000.00, against DeWitt T. Hobbs, Jr., a joint maker thereof, in the aggregate sum of $87,833.48, representing a principal balance due of $47,716.82, plus interest of $32,132.66 to December 31, 1970, plus 10% attorneys' fees of $7,984.00, attorneys' fees having been reserved in said note, plus interest at 6% per annum from January 1, 1971, until paid; provided; however, there shall be credited against this judgment award the sum of $28,457.98 from the fund of $27,686.96 on deposit in this Court when said fund is received by the said noteholder; and

3. Magnolia Mobile Homes Manufacturing Corporation, of Vicksburg, Mississippi, successor of Custom Finance Company, is hereby AWARDED Final Judgment on the promissory note payable to Custom Finance Company dated May 30, 1966 in the original amount of $100,000.00 against DeWitt T. Hobbs, Jr., joint maker on said note, in the aggregate sum of $43,912.20, representing the principal balance due on said note of $23,912.20, plus accrued interest to December 31,

1970 of $16,061.78, plus 10% attorneys' fees of $3,992.00, attorneys' fees having been reserved in said note, said judgment to bear interest at 6% per annum from January 1, 1971 until paid; provided, however, there shall be credited against said judgment award the sum of $9,228.98 of the fund of $27,686.96 on deposit in this Court when such fund is received by said noteholder; and

4. The Cross-Claim of DeWitt T. Hobbs, Jr., against Guerdon Industries, Inc., Magnolia Homes Manufacturing Corporation and Custom Finance Company is hereby ORDERED FOREVER DISMISSED with prejudice; and,

5. Magnolia Mobile Homes Manufacturing Corporation is also awarded a Final Judgment against DeWitt T. Hobbs for the costs of this proceeding, including, but not limited to, the attorneys' fees of Old Kent Bank & Trust Company in filing of the Interpleader Petition in the sum of $1,140.00 and its costs of $104.20, both of which sums in the course of this proceeding were deducted from the bank reserve account deposited in this Court by Old Kent Bank & Trust Company; which judgment shall bear interest at 6% per annum from the date of this judgment.

District Judge
In Norfolk, Virginia
February 2, 1971

IN THE UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF VIRGINIA

Norfolk, Division

OLD KENT BANK AND TRUST CO.

v.

DeWITT T. HOBBS, JR., *et als*

CIVIL ACTION
464-70-N

[Second]

FINAL JUDGMENT

This day came the parties on the Cross-Bill of Guerdon Industries, Inc. and Magnolia Homes Manufacturing Corporation praying judgment against DeWitt T. Hobbs, Jr. on a certain negotiable promissory note dated May 12, 1966 in the sum of $499,841.43; on the Answer to DeWitt T. Hobbs, Jr.; on the evidence heard *ore tenus* in open court on January 4 and 5, 1971, and the exhibits filed therein; on the Motion for Summary Judgment with exhibits attached filed by the Cross-Plaintiffs; on the argument of counsel heard on February 2 and March 2, 1971; on the Motion and Affidavit of DeWitt T. Hobbs, Jr. for Relief pursuant to Rule 60 of the Federal Rules of Civil Procedure; and on the Memorandum Opinion of the Court dated March 5, 1971; and,

It appearing to the Court from the foregoing that there is no genuine, material issue of law or fact to be determined by the Court and that DeWitt, T. Hobbs, Jr. is justly indebted to Magnolia Homes Manufacturing

Corporation of Vicksburg, Mississippi, parent and successor of Magnolia Mobile Homes Manufacturing Corporation of Virginia and Armor Mobile Homes Sales Corporation of Virginia, on a certain note dated May 12, 1966 in the principal sum of $499,841.43, plus interest, costs and attorneys fees as provided in said note;

Now, therefore, the Court doth ORDER, ADJUDGE and DECREE that Magnolia Homes Manufacturing Corporation of Vicksburg, Mississippi, be, and it hereby is, awarded judgment against DeWitt T. Hobbs, Jr. in the principal sum of $499,841.43, plus interest of six per cent (6%) per annum from May 12, 1966 to the date hereof in the sum of $145,203.95, plus ten per cent (10%) attorneys fees and the costs of this proceeding, which judgment shall bear interest at the rate of six per cent (6%) per annum from the date hereof.

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 71-1578

Old Kent Bank & Trust Company,
Original Interpleader Plaintiff,

versus

DeWitt T. Hobbs, Jr.,
Appellant,

and

Custom Finance Company, etc.,
Guerdon Industries, Inc., etc., and
Magnolia Homes Manufacturing Corporation,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.

MacKenzie, District Judge.

(Argued December 7, 1971 Decided January 27, 1972.)

Before Boreman, Senior Circuit Judge, and Winter and Craven, Circuit Judges.

Charles R. Cloud (Peter K. Babalas, on brief) for Appellant, and E. Leslie Cox and Robert R. MacMillan (Breeden, Howard and MacMillan, on brief) for Appellees.

PER CURIAM:

In an interpleader action, the defendants filed cross-claims against one another. DeWitt T. Hobbs, Jr. sought a declaration that he was discharged from liability on two notes, in the aggregate amount of $300,000.00, payable to Custom Finance Company because of payment in full, or, in the alternative, bacause of Custom's breach of agreement between him, Custom, Magnolia Homes Manufacturing Corporation, and Guerdon Industries, Inc.; and he sought damages from Custom, Magnolia and Guerdon. The agreement had been entered into after Hobbs' enterprise, Eastern Trailer Sales, Incorporated, and its subsidiaries, were recognized to be in severe financial difficulty and it was made in an effort to save them. New loans of $300,000.00 were made to Eastern and Hobbs, evidenced by the two notes and a third note evidencing existing indebtedness of $499,841.43 was also given. The new loans and the existing indebtedness were secured and the lenders made certain agreements as to how they would deal with the collateral. Custom cross-claimed against Hobbs for the unpaid balance of those notes and the third note. The district court entered judgment against Hobbs for the unpaid balance of the notes and dismissed Hobbs' cross-claim for damages for lack of proof. Hobbs has appealed.

The only two questions raised on appeal are whether Hobbs was discharged from liability on the notes because of Custom's breach of the agreement and whether Hobbs proved his entitlement to damages

for breach of the agreement.* As to the former, it is Hobbs' argument that he was a surety on the notes and not a maker and as a surety, discharged by treatment of the collateral not in accordance with the agreement and without his consent; but we agree with the district court that Hobbs was a maker. We need not consider what defenses, if any, he might be able to assert if he were a surety. We also agree with the district court that Hobbs failed prove that the agreement was breached and, hence, that he was entitled to damages. The proof to show unpaid balances on the three notes in the amounts for which judgment was entered was sufficient.

AFFIRMED.

*Motions to dismiss the appeal for failure to comply with various Rules of Appellate Procedure were filed. Although it is clear that the rules were not complied with, we need not consider these defaults in the view we take of the appeal on its merits.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1578

Old Kent Bank & Trust Company,
Original Interpleader Plaintiff,

versus

DeWitt T. Hobbs, Jr.,
Appellant,

and

Custom Finance Company, etc.,
Guerdon Industries, Inc., etc., and
Magnolia Homes Manufacturing Corporation,
Appellees.

ORDER

The petition for rehearing of DeWitt T. Hobbs, Jr. having been read and considered, it is with the concurrence of Judge Boreman and Judge Craven, ORDERED, that said petition be, and it is hereby, denied.

For the Court:

s/Harrison L. Winter
United States Circuit Judge
March 3, 1972
Samuel W. Phillips Clerk